United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

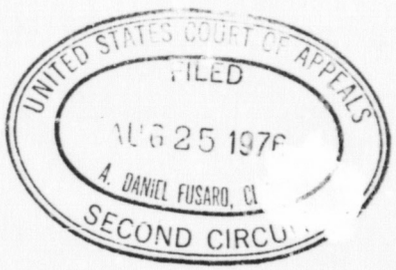
v.

RUBEN DARIO ROLDAN,

Appellant.

76-1113

REPLY BRIEF FOR APPELLANT RUBEN DARIO ROLDAN



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POINT I

UNITED STATES v. DuVALL REQUIRED THAT THE DISTRICT COURT SUPPRESS THE CONSENT STATEMENT.

The Government has not distinguished United States v. Duvall, 2d Cir. Feb. 26, 1976, nor sustained its "heavy burden" of demonstrating scrupulous compliance with Miranda during its pre-arraignment interview of Roldan (RBr 12).*

The testimony supports our position, not the Government's. Nesland was asked (5971, RA - 12): "Did you inform Mr. Roldan of what the charges were in the indictment?". His answer: "Correct". Question: "Did you tell him he

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* "RBr" connotes our Main Brief, "GBr", the Government's Brief, and "RA" The Appendix to our Main Brief.

could get 15 years on each count (emphasis supplied)?" Answer: "Very possibly."

Nesland did not need to say in so many words, "You will receive a 75 year sentence if you don't cooperate." It was enough, as in Duvall (as the Government concedes, GBr 72) for him to convey to Roldan that the possible sentence was seventy-five years, i.e., fifteen years on each of five counts.

In short, the burden was the Government's. It had to prove that Nesland did not express the possibility of a seventy five year sentence to Roldan. It did not. Indeed, the only conclusion from the testimony was that he did. Under Duvall, such expressions during a pre-arraignment interview, without counsel, mandated suppression of the statement.

Three additional points. (1) We discussed (RBr 15-16) the similarity between Roldan's interview and that of Beatrice Gonzalez to buttress our point under Duvall (not that this was needed; Nesland's remarks about a possible sentence was enough), and to set forth an additional ground to suppress. According to the Government (GBr 73), Roldan waived his rights because he went on to answer questions and failed to ask for counsel. This is wrong. Beatrice Gonzalez also went on to answer questions and that was not a waiver as to her. With all the other coercive factors (RBr 15-16), Roldan's failure to request an attorney could not be conclusive against him. (2) The Govern-

ment gives no response to our overwhelming showing that the Nesland testimony prejudiced Roldan (RBr 16-18, GBr 72*). If therefore, the district court erred in failing to suppress the pre-arraignment statements (and error there was), there must be a reversal. (3) The district court granted a hearing at trial on the validity of Roldan's alleged Miranda waiver, and then ruled on what it termed Roldan's motion to suppress. (6014, 6016; RA-16, 18). The Government cannot challenge here the district court's exercise of its discretion under F.R. Crim. P. 12(f) to relieve Roldan from any procedural waiver (GBr 71*).

The fact is, moreover, that the Government itself invited the district court to disregard the supposed procedural waiver and to rule on the merits of the Nesland interview of Roldan. Although the matter formally came up on the pre-trial motion to suppress the Beatrice Gonzalez statement, reserved to trial, the Assistant stated (5943, RA-2):

> "I want the record to reflect that Mr. Nesland took a statement from Mr. Jacobs' client Ruben Roldan and we can question him about those."
>
> "THE COURT: Do you want to inquire into both statements at the time? All right, and then I will use the testimony as I see it.

The Assistant then proceeded to question Nesland about

both Roldan and Gonzalez (5944, 5949-50; RA-3, 7-8).

There is no merit to the Government's statement that "the issues reaised here were never even suggested as grounds for suppression" (GBr 71*). The issue before the district court, as here, was whether on the facts elicited at the hearing there was a valid Miranda waiver. These facts included Nesland's statement as to sentence, which Roldan's counsel specifically made part of the district court record.

POINT II

THE RULES OF EVIDENCE CANNOT BE STRETCHED TO PERMIT THE TESTIMONY OF HOFFMAN.

The district court ruling that Gustavo Hoffman could testify stretched the rules of evidence beyond their language and intent. We regret that on oral argument we left doubt on the point in the mind of the Court. We can best clear up those doubts by a short step by step presentation of the points at issue.

(a) The calls on tapes 439 and 724 were made to Roldan's number and someone named Dario responded. The Government was entitled to have these tapes before the jury, and the jury could find under evidentiary rule 901 (b)(6) that the speaker was Roldan. The jury did not have to find that. Based on other evidence in the case, or nothing at all,

the jury could find that the speaker was not Roldan. The Advisory Committee's notes to Rule 901(b)(6) make this quite clear, stating: "the entire matter is open for exploration before the trier of fact."

(b) The Government was entitled to have the incriminating tapes before the jury; and to argue to the jury that the "Dario" on those tapes was the same as the voice of "Dario" on the standard; so that if the jury concluded that Roldan had talked on the standard tapes, it could conclude that he had talked on the incriminating ones.

(c) If the Government had a witness who could "identify" the voice, it was entitled to present him to the jury under Rule 901(b)(5). The witness did not have to be an expert. The criterion was that the witness have "heard the voice at any time under circumstances connecting it with the alleged speaker."

(d) At trial (6435,RA-37; RBr 21), the Government insisted that Hoffman was not being called to "identify" Roldan's voice.*

Rule 901(b)(5) therefore could not apply to justify the testimony. The Government recognized that although an attempt could be made to squeeze Hoffman within the literal meaning of the rule, that would distort both its meaning and intent.

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* See also GBr 78.

The typical case of voice "identification" is where the witness has personally met defendant. Although that is not the only means of identification, the rule obviously was not meant to apply to testimony by a person with absolutely no involvement in the facts of the case, who has never met defendant nor heard his voice, and who is to give an opinion based solely on materials before the jury, with no competence beyond any member of the jury.

(This demonstrates why United States v. Chiarizio, 525 F.2d 289 (2d Cir. 1975) is distinguishable. There, the agent heard defendant's voice on an exemplar given by defendant at FBI headquarters. Thus, unlike here, there was no jury issue about the voice used as the foundation. Beyond that, however, the agent could make a true identification from the exemplar, and testify even if the exemplar itself was not played to the jury, as in fact it wasn't. Here, Hoffman could only give an opinion based on material before the jury. Take the standard tapes away, and he could not testify.)

(e) The Government presented Hoffman to testify that he had listened to the standard tapes for purposes of trial, he had listened to the incriminating tapes for purposes of trial, and in his opinion, the "Dario" on the standard was the same as the "Dario" on the incriminating tapes. The Assistant reiterated that Hoffman was giving an advisory opinion to the jury (6439, RA-41). The point could not be clearer that

Hoffman's testimony was expert testimony (RBr 20-22), not identification. Since he was not an expert, his testimony was improper.*

POINT III

BY THE GOVERNMENT'S ADMISSIONS THE TAPE TRANSCRIPTS WERE NOT READY ON APRIL 4, 1975. THE GOVERNMENT ACCORDINGLY WAS NOT READY FOR TRIAL WITHIN SIX MONTHS OF INDICTMENT AND ARREST. NO EXCLUSIONS EXCUSE THE DELAY.

The Government's response to our speedy trial contentions belies the record and the authorities.

The tapes were the guts of the Government's case against Roldan and most of the other Segment III defendants. This was not defendant's "conception of the manner in which the Government should present its evidence" (GBr 54), or even the court's. It was the Government's. At the April 17, 1975 hearing, Judge Pollack asked the Assistant (Hearing p. 11; RA-76):

> "Now, as far as the transcripts are concerned, it would be silly to go to trial without a transcript for each individual; that's very clear, isn't it?".

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* We do not object to the jury's comparing the tapes. We object to the Government's receiving Hoffman's aid in having the jury make the comparison.

The Assistant agreed that the Government could not really proceed without the translations and transcripts (Ibid):

> "MR. CAREY: Yes, Sir. The tapes are in Spanish, your Honor."

Moreover, in February the Government had secured from Judge Tyler an additional thirty days to file its notice of readiness on the specific representation that the tapes were crucial to its case, and that it needed extra time to translate and transcribe them (RBr 10; Carey Aff. Jan. 10, 1975).

The authorities do not permit a claim of "ready" under these circumstances. United States v. Fernandez, 480 F. 2d 726 (2d Cir. 1973) (GBr 54) held that the Government was ready, although it had not turned evidence over to defendant, only because the Government had the evidence, was prepared to furnish it to defendant, and would have done so if the case had been set for trial. United States v. Pollak, 474 F. 2d 828 (2d Cir. 1973) held that the Government could not say it was ready when it did not have its evidence in a position to comply with a discovery order. Here, admittedly the translation transcripts were not ready until May 1, 1975 (GBr 55), almost one month beyond the six months cut off date of April 4, 1975.* Under Fernandez and Pollak, the Government was not

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* In the face of United States v. Flores, 501 F. 2d 1356 (2d Cir. 1974) and Hilbert v. Dooling, 476 F. 2d 355 (2d Cir. 1973) (RBr 26*), the Government's discussion of whether the six months should run from the date of original indictment and arrest or superseding indictment (GBr 50*) is incredible.

ready when its case was in that posture -- quite apart from whether the event triggering the inquiry was the Government's failure to comply with a discovery order.

This leaves only the exclusions. As to the motions of Roldan (GBr 56) the chief point of those motions was to assert rights under the speedy trial rules, and later, to dismiss because the Government had failed to comply with those rules.* Clearly, those motions -- asserting the Prompt Disposition Rules -- could not be used to give the Government more time under the Rules.

As to Roldan's joinder with Gonzalez (GBr 57), again, at least some of Gonzalez motions were based on the speedy trial rules themselves. Gonzalez made no formal discovery motions which could count here, as the Assistant specifically stated to Judge Pollak on April 17 (RA 74). And the suppression motion related to evidence pertaining solely to Gonzalez, and did not hold up to proceedings as to Roldan. The Rules cannot be construed to make such time chargeable to Roldan.

POINT IV

THE GOVERNMENT CONSENTED TO A HEARING ON THE WIRETAPS MINIMIZATION ISSUE

Prior to trial at least six different motions brought

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* See, e.g., GBr 51, the Government's chronology, noting that the January motions were made pursuant to Rule 3 of the Speedy Trial rules.

the issue of the legality of the wiretaps before the district court. And the motions of defendants Robinson and Jorge Gonzalez specifically stated as one basis the failure to minimize as to non-subjects -- the grounds of attack in the joint brief.

On August 5, 1975 the Government served and filed a response to the motions in which (a) it consented to a determination of the legality of the wiretap orders, without a hearing; and (b) it consented to a hearing on the execution of the wiretap orders -- to wit, on minimization. That affidavit is part of the record on appeal, and we annex hereto the pertinent excerpt. This disposes completely of the Government's present argument (GBr 46) that the claims were not properly raised, and therefore denial without a hearing, at which the Government would have to meet its burden of proof, was proper.

We note the Government's reference to a "reply" requesting denial of the motions without a hearing (GBr 46). That reply is not in the Court files and therefore not part of this record. As far as we can tell it was not served on defendants. Even if it were, it could not detract from the Government's consent to a hearing which the district court should have held, but never did.

Respectfully submitted,

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Donald E. Nawi

Of Counsel

MQC:lq
M-575

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
-v-	:	AFFIDAVIT
ALBERTO BRAVO, et al.,	:	75 Cr. 429 (JMC)
Defendants.	:	

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

MICHAEL Q. CAREY, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Paul J. Curran, United States Attorney for the Southern District of New York and as such I have been assigned responsibility for the captioned matter and I am fully familiar with the facts and circumstances, papers and prior proceedings herein.

2. I make this affidavit in opposition to the motions of defendants for a Bill of Particulars and discovery and inspection, and to dismiss the indictment and counts thereof, for a judgment of acquittal, to sever counts of the indictment, for a separate trial of certain defendants, to suppress tangible evidence, a post arrest statement and wiretap recordings, to strike a notice of readiness filed with respect to Indictment 74 Cr. 939, to amend the indictment, for a change of venue, to reduce bail, to correct a sentence received in the United States District Court for the Western District of Texas, for an order permitting a defendant to negotiate a plea agreement, to adopt all or certain motions of co-defendants, for leave to file additional motions, for depositions and for a speedy trial.

Motion For Separate Trials

182. The Government opposes the motion of Olegario Montes, Gaston Robinson and Ruben Dario Roldan for a separate trial from that of the other defendants. (See Government Memo of Law).

183. Beatrice Valencia is a fugitive and her motion to sever her trial from that of the other defendants need not be considered.

Motion to Suppress Confession

184. Defendart Beatrice Valencia has moved to suppress a statement she made to an Assistant United States Attorney on October 5, 1974. (Notice of Motion ¶ F). Since the defendant is a fugitive and is not expected to be available for trial, her motion need not be considered.

Motion to Suppress Wiretap Evidence

185. On the motions of Francisco Armedo, Ramiro Estrada, Jorge Gonzalez, Edgar Restrepo, Gaston Robinson and Ruben Dario Roldan to suppress the wiretap evidence the Government consents to a determination by the court, without a hearing, of the legality of the orders relating to the wiretaps in this case and to a hearing by the Court on the legality of the execution of such wiretap orders.

Motion to Strike Notice of Readiness

186. Defendants Jorge Gonzalez and Ruben Dario Roldan have moved to strike the Government's Notice of Readiness, dated February 18, 1975, filed with respect to Indictment 74 Cr. 939. The Government opposes such motions. Such motion must be made before the district judge to whom Indictment 74 Cr. 939 is assigned.

187. Indictment 74 Cr. 939 is assigned to the Honorable Milton Pollack, United States District Judge. On April 17, 1975, Judge Pollack denied motions identical to those made here by defendants Jorge Gonzalez and Rubin Daric Roldan.

ROBERT B. FISKE JR.